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No. 140

Supreme Court of the United States

OCTOBER TERM, 1942.

EUGENE W. OSMENT, PETITIONER,

VS.

NORMAN B. PITCAIRN AND FRANK C. NICODEMUS, JR., RECEIVERS OF THE WABASH RAILWAY COMPANY, A CORPORATION, RESPONDENTS.

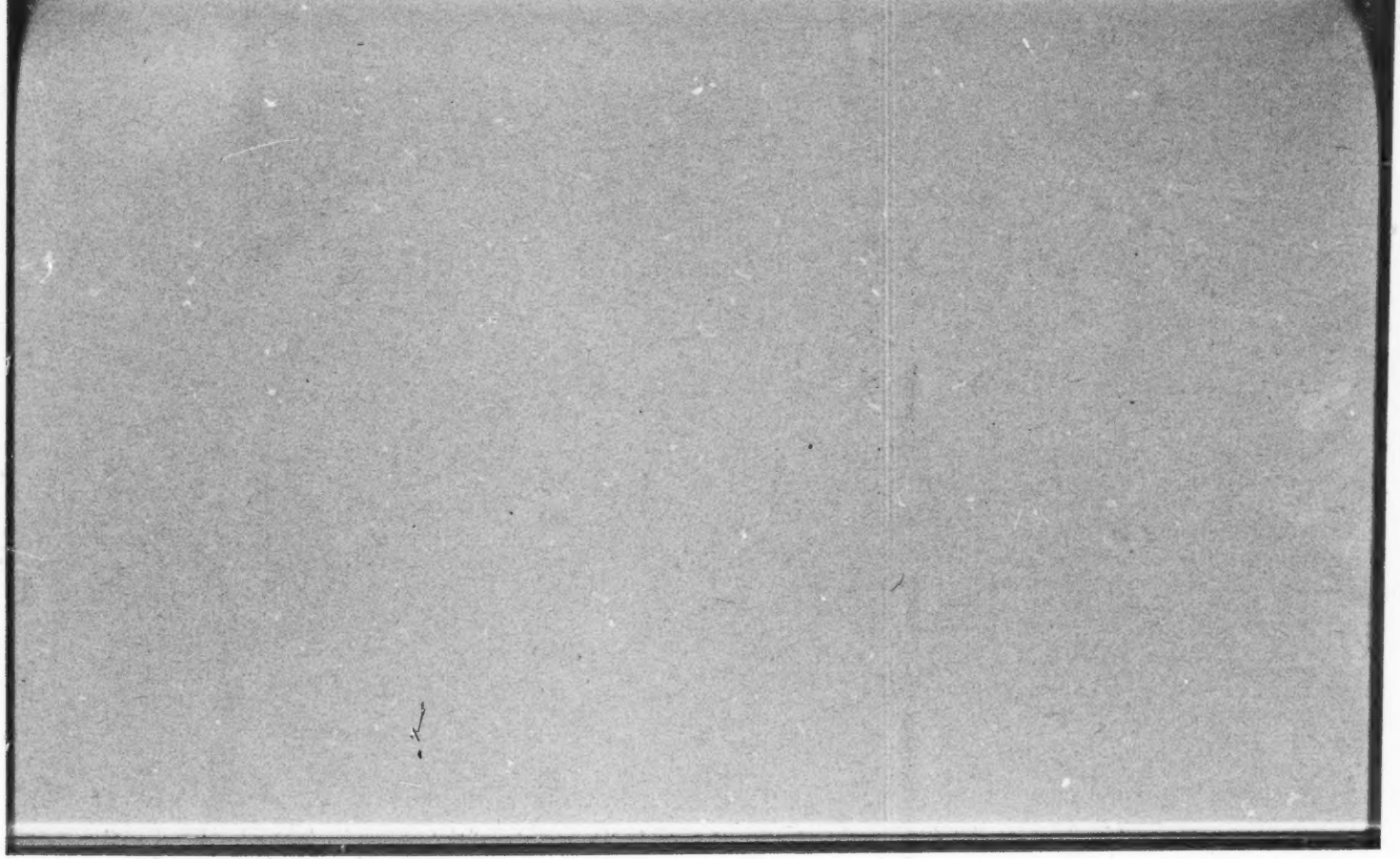
ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI.

PETITIONER'S REPLY BRIEF.

HARRY G. WALTNER, JR.,
Attorney for Petitioner.

TRUSTY, PUGH, GREEN & TRUSTY,
RAYMOND E. MARTIN,
Kansas City, Missouri,
Of Counsel.

FRANK T. RILEY PRG CO KANSAS CITY MO



INDEX.

	PAGE
Argument	1
Jurisdiction	1
(a) Petitioner is not entitled to transfer to court en banc on motion as matter of right	8
(b) The court en banc had no power, discretionary or otherwise, to entertain an application to review the judgment of Division Two; and petitioner had no right to invoke jurisdiction of Division Two to grant a transfer under second clause of Section Four of Amendment after disposition by Division Two	10
(c) The court en banc is not a higher court than Division Two and a transfer to the court en banc does not constitute an appellate review but merely constitutes a rehearing	19
(d) Finality of Opinion	25
Conclusion	27

AUTHORITIES.

Aetna Ins. Co. v. Hyde, 327 Mo. 115, 34 S. W. (2d) 85	27
Andrews v. Virginian Ry. Co., 248 U. S. 272, 39 S. Ct. 101	3, 25
Betts v. Brady, 86 L. Ed. 1116	4
Central Union Tel. Co. v. City, 269 U. S. 190, 195, 46 S. C. R. 90, 91, 70 L. Ed. 229	6
Chesapeake and Ohio Ry. Co. v. DeAtley, 241 U. S. 310, 36 S. Ct. 564, 566	5

PAGE

Chesapeake & Ohio Ry. Co. v. Mihas, 280 U. S. 102, 50 S. Ct. 42 4

Fears v. Newman Merc. Co., (Mo. en banc), 156 S. W. (2d) 909, 910 23

Fisher v. Carrico, 122 U. S. 522, 7 S. Ct. 1227.. 3

Frohman v. Lowenstein, 303 Mo. 339, 260 S. W. 460 22

Gorman v. Washington University, 62 S. Ct. 962, 86 L. Ed. 895 ..... 2, 9, 19

Great Wstrn. Tel. Co. v. Burnham, 162 U. S. 339, 16 S. Ct. 850 3

Gypsy Oil Company v. Escoe, 275 U. S. 498, 48 S. Ct. 112 24

Hagon v. Paullin, 231 U. S. 583, 34 S. Ct. 178.. 5

Huckelberry v. Mo. Pac. Ry. Co., 324 Mo. 775, 26 S. W. (2d) 980, l. c. 988 9

Matthews v. Huwe, 269 U. S. 262, 46 S. Ct. 108.. 3

McAllister v. St. L. Mchts. Bridge & Ter. Ry. Co., 324 Mo. 1005, 25 S. W. (2d) 791..... 9

McComb v. County Commr., 91 U. S. 1, 23 L. Ed. 185 2

McFadin v. Catron, 138 Mo. 197, 39 S. W. 771.. 11

McMaster v. Gould, 276 U. S. 284, 48 S. Ct. 299.. 3

Minneapolis St. P. etc. Ry. Co. v. Rock, 279 U. S. 410, 49 S. Ct. 363 ..... 4, 10

Morgan v. Kroger Gro. Co., (Mo. en banc), 154 S. W. (2d) 44, 46 23

Morris v. K. C. etc. Co., 303 Mo. 475, 258 S. W. 431 22

Mullen v. Wstrn. Union Beef Co., 173 U. S. 116, 19 S. Ct. 404 3

North Laramie Land Co. v. Hoffman, 268 U. S. 276, 282, 45 S. C. R. 491, 494, 69 L. Ed. 953.. 6

PAGE

Riley v. Wabash Ry. Co., 328 Mo. 910, 44 S. W. (2d) 136, 142 9

Rowie v. Chicago, B. & Q. R. Co., 274 S. W. 1031 17

Scheufler v. Manufacturers Lumbermen's Underwriters, 163 S. W. (2d) 749 .....11, 13, 21

Smith v. K. C. Pub. Service Co., 328 Mo. 979, 43 S. W. (2d) 548, 555 23

Southern Electric Co. v. Stoddard, 269 U. S. 186 2

Southern Ry. Co. v. Clift, 260 U. S. 316, 43 S. Ct. 126 5

State ex rel. Berkshire v. Ellison, 287 Mo. 654, 230 S. W. 970, 971 25

State v. Duestrow, 137 Mo. 44, 39 S. W. 266.... 11, 21

State v. Haney, 168 Mo. 167, 67 S. W. 620..... 11, 22

Stratton v. Stratton, 239 U. S. 55, 36 S. Ct. 26.. 3

Stebbins v. Riley, 268 U. S. 137, 146, 45 S. C. R. 424, 427, 69 L. Ed. 884 6

Sutton v. Anderson, 326 Mo. 304, 31 S. W. (2d) 1026, 1030 23

Waggoner Elec. Mfg. Co. v. Lyndon, 262 U. S. 226, 43 S. Ct. 589, 591 5

Watson v. Buck, 313 U. S. 387, 61 S. C. R. 962, 85 L. Ed. 1416 6

Wilson and Company v. Hartford Fire Ins. Co., 254 S. W. 266 17

STATUTES.

Article VI Constitution of Missouri, Sections 7-5 6

Section One Amendment of 1890 to ArticleVI.. 6, 11, 13

Section Three of Article VII of the Constitution 7, 13

Section Four of the Amendment of 1890 to Art. VI of Constitution of Mo. 6, 9, 11, 12, 13, 15, 17, 21

PAGE

Section 237(b) Judicial Code, 28 U. S. C. A. 344(b) 1, 2, 5
Section 1235 R. S. Mo. 1939 26
Section 2047, R. S. Mo. 1939 27

TEXT BOOKS.

Black's Law Dictionary, second edition 12, 20
21 C. J. S., page 21, Section Seven 20
Webster's New International Dictionary 12

RULES.

Rule 21 of Missouri Supreme Court 15, 21
Rule 24 of Missouri Supreme Court..6, 9, 10, 13, 15, 17, 26

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ARGUMENT.

JURISDICTION.

Respondents' objection to the jurisdiction of this Court is limited to the claim that petitioner has not come within the clause of Section 237(b) of the Judicial Code, 28 U. S. C. A. 344(b) requiring that the judgment or decree to be reviewed, "has been rendered or passed by the highest court of the state in which a decision could be had", because:

"Under the provisions of the Missouri Constitution, the judgment rendered by Division Two was not rendered by the highest court of Missouri in which a decision could be had." (Respondents' brief, pp. 6-7).

The sole reason advanced is that:

"The losing party there (petitioner here) made no application to transfer the cause to the Missouri Supreme Court en banc, although the power of said *Division Two* to make such transfer on such application exists *under the second clause of Section 4* of the 1890 amendment to Article VI of the Missouri Constitution." (Respondents' brief, p. 6).

There is no claim that the judgment or decree is not final. The construction of the phrase: "Highest Court of the state in which a decision could be had", as employed in Section 237(b) of the Judicial Code is, of course, to be governed by the decisions of this Court. A careful study of the decisions of this Court, as cited by respondents and as cited by the Court in the recent case of *Gorman* v. *Washington University,* 62 S. Ct. 962, 86 L. Ed. 895, together with other decisions we have been able to discover, formulate the following construction of the clause in question:

1. Where the opinion or decision is not by the highest state court and where, under the laws and rules of court of the state, a review could have been obtained in the highest court of the state on application as a matter of right, as where the party has a specific right to force the Court to grant his request and such is not done, this Court has no jurisdiction to review the judgment.

Southern Electric Co. v. *Stoddard,* 269 U. S. 186.
McComb v. *County Commr.,* 91 U. S. 1, 23 L. Ed. 185.
Gorman v. *Washington University, supra.*

2. Where discretionary power to review exists in the highest court of a state, and state practice provides a fixed clear right to invoke such discretion and force the Court to act for or against the request, it is necessary to invoke the exercise of such discretion in order that, upon the refusal to do so, there may be no question concerning the right to review in this Court.

Fisher v. *Carrico,* 122 U. S. 522, 7 S. Ct. 1227.
Stratton v. *Stratton,* 239 U. S. 55, 36 S. Ct. 26.
Great Wstrn. Tel. Co. v. *Burnham,* 162 U. S. 339, 16 S. Ct. 850.
Mullen v. *Wstrn. Union Beef Co.,* 173 U. S. 116, 19 S. Ct. 404.
Andrews v. *Virginian Ry. Co.,* 248 U. S. 272, 39 S. Ct. 101.
Matthews v. *Huwe,* 269 U. S. 262, 46 S. Ct. 108.
McMaster v. *Gould,* 276 U. S. 284, 48 S. Ct. 299.

A review and analysis of the above cases indicate that this Court will decline jurisdiction only on the ground that the decision is not that of the highest court in the state, where:

1st. The decision appealed from is that of an inferior court of the state; and

2nd. Petitioner, as a matter of right upon application, either in such inferior court or in the highest court, is entitled to a review; or:

3rd. A clear right exists to file an application in the highest court for the purpose of forcing it to consider the application and exercise its discretion as to whether or not it will review the judgment.

It is not a necessary prerequisite to review by this Court that petitioner exhaust all conceivable remedies to have the cause heard in another or higher court or that he attempt by filing every conceivable type of pleading to arouse the *discretion* of a court or division to *entertain* an application in respect to such a remedy.

In *Minneapolis St. P. etc. Ry. Co.* v. *Rock,* 279 U. S. 410, 49 S. Ct. 363, this Court held that where the Supreme Court of Illinois had refused petitioner a writ of certiorari to the court of appeals of Illinois it was not necessary for it to exhaust all possible remedies by then applying to the Court of Appeals for a, "certificate of importance and appeal" for the purpose of invoking the discretion of that court to transfer the case to the Illinois Supreme Court.

In *Chesapeake & Ohio Ry. Co.* v. *Mihas,* 280 U. S. 102, 50 S. Ct. 42, this Court affirmed the holding in the Rock case.

Where there is a final judgment of a state court which is not subject to *review* by a higher state court, it is unnecessary for petitioner to exhaust all state remedies by appealing to other state tribunals for relief, even though he has a right to do so. In the recent case of *Betts* v. *Brady,* 86 L. Ed. 1116, petitioner had previously applied unsuccessfully for a writ of habeas corpus to Judge Bond, the chief judge of the Court of Appeals of Maryland. He then asked that a writ of certiorari issue from this Court to the Court of Appeals of Maryland. This Court pointed out, l. c. 1119:

> "The judgment was final in the sense that an order of a Maryland judge in a habeas corpus case, whatever the court to which he belongs, is not reviewable by any other court of Maryland except in specific instances named in statutes which are here inapplicable. *It is true that the order was not final and the petitioner has not exhausted state remedies in the sense that in Maryland, as in England, in many of the states, and in the federal courts, a prisoner may apply successively to one judge after another and to one court after another without exhausting his right.*" (Italics ours).

"Since Judge Bond's order was a final disposition by the highest court of Maryland in which a judgment could be had of the issue joined on the instant petition, we have jurisdiction to review it."

It does not appear that a petitioner must exhaust all of his remedies in the highest court of a state in which he may have an adjudication by asking for a rehearing therein. We have found no case so holding and the case of *Southern Ry. Co.* v. *Clift*, 260 U. S. 316, 43 S. Ct. 126, indicates that such is not necessary.

From the analysis thus made of Section 237(b) of the Judicial Code as construed by this Court, the conclusion is inevitable that this Court has jurisdiction to review the judgment herein, unless under the Constitution and laws of Missouri and rules of the Missouri Supreme Court: (1) The Court en banc is a higher court than Division Two; (2) Petitioner could have had the decision reviewed by the court en banc on application as a matter of right; or (3) the court en banc had discretionary power to review the judgment of Division Two and petitioner had a clear, fixed and specified right to invoke such power by motion and to force the Court to act for or against him.

These are questions of Missouri practice and procedure and are to be determined by referring to the Constitution, laws and rules of court of Missouri. Questions of state practice and procedure are controlled by the decisions of the state court, even though federal rights are in controversy.

Chesapeake and Ohio Ry. Co. v. *DeAtley*, 241 U. S. 310, 36 S. Ct. 564, 566.

Hagon v. *Paullin*, 231 U. S. 583, 34 S. Ct. 178.

Waggoner Elec. Mfg. Co. v. *Lyndon*, 262 U. S. 226, 43 S. Ct. 589, 591.

It is well established by the federal courts that they are bound by the meaning and application given state statutes and state constitutions by the courts of last resort of the state involved.

Stebbins v. *Riley,* 268 U. S. 137, 146, 45 S. C. R. 424, 427, 69 L. Ed. 884.

Central Union Tel. Co. v. *City,* 269 U. S. 190, 195, 46 S. C. R. 90, 91, 70 L. Ed. 229.

North Laramie Land Co. v. *Hoffman,* 268 U. S. 276, 282, 45 S. C. R. 491, 494, 69 L. Ed. 953.

Watson v. *Buck,* 313 U. S. 387, 61 S. C. R. 962, 85 L. Ed. 1416.

Although respondents have restricted their argument to the second clause of section four of the Amendment of 1890 and Rule 24 of the Missouri Supreme Court, it is necessary to go fully into the constitutional provisions governing the Supreme Court of Missouri and the interpretation given them by that court, to solve the jurisdictional question herein presented.

Article VI of the Constitution of Missouri created a supreme court of five judges and gave it appellate jurisdiction and general superintending power over inferior courts and power to issue, hear and determine remedial writs. (Sections 7-5, Article VI).

Section One of the Amendment of 1890 to Article VI of the Constitution of Missouri, increased the members of the Supreme Court from five to seven. It provides that the Court shall be divided into two divisions, Division One to consist of four judges, and Division Two to consist of three; that the divisions shall sit separately and have concurrent jurisdiction of all matters and causes in the Supreme Court, except that Division Two shall have exclusive jurisdiction of criminal cases. It further provides that a cause may be transferred to the court en banc as provided in Section Four of the amendment.

It further provides that the division of business shall be made as the Court may determine, and

> "All orders, judgments and decrees of either division as to causes and matters pending before it, shall have the force and effect of those of the court."

Section Two provides for the appointment and election of judges; their terms and to what division they shall be assigned.

Section Three provides that the Court shall assign to each division the causes and matters to be heard by it; that all laws relating to practice in the Supreme Court, as well as the rules of the Supreme Court shall apply to each division; that each division shall have the authority to issue the original writs and exercise the powers enumerated in Section Three of Article VI of the Constitution. (Section Three gives the Supreme Court, "general superintending control over all inferior courts" and gives it the, "power to issue writs of habeas corpus, mandamus, quo warranto, certiorari and other original remedial rights, and to hear and determine the same.")

Section Four of the amendment, which is made the basis of respondents' claim herein, provides as follows:

> "(1) When the judges of a division are equally divided in opinion in a cause, or when a judge of a division dissents from an opinion therein, or when a federal question is involved, the cause, on application of the losing party, shall be transferred to the court for its decision; or
>
> (2) When a division in which a cause is pending, shall so order, the cause shall be transferred to the court for its decision." (Numbering and paragraphing of the clauses, ours).

The only rule of the Missouri Supreme Court having reference to transfer to the court en banc is Rule 24. This rule has application only to the first clause of

Section Four since it applies, not to "pending" cases, but to those where there has been a "final disposition by the division". It merely limits the time in which an application to transfer under the first clause may be filed, to ten days. It is as follows:

> "A motion to transfer a cause *under the provisions of the constitution* from either division to the court en banc must be filed within ten days *after the final disposition of the cause by the division,* and notice of such motions may be given as provided in Rule 23." (Italics ours).

(a) Petitioner is not entitled to transfer to court en banc on motion as matter of right.

Although it cannot be denied that the Missouri Court en banc is not a higher court than Division Two, we will first dispose of the proposition that petitioner would, on application, have been entitled to a transfer to the court en banc. If any such right existed it had to be created by the first clause of Section Four.

Respondents make no claim that petitioner was entitled to make application for a transfer to the court en banc under the first clause of Section Four, and there would be no basis for such a claim because the judges of Division Two were not equally divided in opinion, there was no dissent and no, "federal question", was involved within the meaning given the phrase by the Missouri Supreme Court.

Under the decisions of the Supreme Court of Missouri, the meaning of the term, "federal question", as used in the amendment, is restricted to causes "involving construction of the Constitution of the United States, or where the validity of a treaty or statute of or authority exercised under the United States is drawn in question." The application and construction of rights arising under

the Federal Employers Liability Act and other federal acts do not constitute a "federal question" as that term is interpreted in Section Four of the amendment.

McAllister v. *St. L. Mchts. Bridge & Ter. Ry. Co.*, 324 Mo. 1005, 25 S. W. (2d) 791.

Riley v. *Wabash Ry. Co.*, 328 Mo. 910, 44 S. W. (2d) 136, 142.

Huckelberry v. *Mo. Pac. Ry. Co.*, 324 Mo. 775, 26 S. W. (2d) 980, l. c. 988.

The case of *Gorman* v. *Washington University*, 86 L. Ed. 895, 62 S. Ct. 962, cited by respondents, considered only the first clause of Section Four and did not consider or even quote the second clause on which respondents' claim herein is rested. In that case, a "federal question" within the meaning of the Missouri decisions was involved in that a construction of the contract clause of the Constitution was sought.

The losing party in that case had a given, fixed and clear right under the first clause of Section Four to make application for a transfer to the court en banc on the ground that a federal question was involved and it was the absolute duty of Division Two upon the timely filing of such application to transfer the case to the court en banc. This absolute right was given in a special class of cases and was as absolute as the right given by the statute to appeal from the judgment of the trial court.

This Court in its opinion points out that under the first clause of Section Four and under Rule 24 of the Supreme Court:

> "Division One of the Supreme Court of Missouri, sitting in the present case, in which 'a federal question is involved' was not the last state court in which a decision of that question could be had. * * * Such a case is one which 'after final disposition of the cause by the division' could on petitioner's ap-

> plication be transferred to the full court for review * * *. Since the Constitution of Missouri had thus provided *in this class of cases* for review of the judgment of a division, the judgment here of Division One is not that of the highest court of a state in which a decision could be had. * * *." (Italics ours).

The present case is not one which involved "a federal question" that could on petitioner's application be transferred to the court en banc "after final disposition by the division" since it did not belong to the class of cases in which such review was provided as a matter of right. The petitioner is in the same position as he would be if the first clause of Section Four and Rule 24 did not exist.

(b) The court en banc had no power, discretionary or otherwise, to entertain an application to review the judgment of Division Two; and petitioner had no right to invoke jurisdiction of Division Two to grant a transfer under second clause of Section Four of Amendment after disposition by Division Two.

Even though respondents contend that the Supreme Court en banc is the highest court in Missouri and that Division Two is an inferior court, and that petitioner had a right to make application to Division Two for a transfer, under the second clause of Section Four, we insist that this Court would still have jurisdiction of the cause under its own decisions. Jurisdiction has only been denied in cases where the petitioner had a right to apply to the highest court in the state for a review and to force the highest court to allow or deny the application (authorities, *supra*). This Court has never denied jurisdiction where the petitioner had failed to invoke the discretionary power of a lower court as to whether or not it would transfer the cause to a higher court. In *Minneapolis St. P. etc. Ry. Co.* v. *Rock,* and *Chesapeake*

& *Ohio Ry. Co.* v. *Mihas*, cited *supra*, jurisdiction was not denied for a failure to invoke the discretion of the inferior court to make a transfer to the highest court. Jurisdiction will only be denied where the lower court on application is *required* to transfer the case to the highest court.

It is definitely settled under the decisions of Missouri that the court en banc can not entertain an application to transfer and has no power to order a division to transfer the cause.

State v. *Duestrow*, 137 Mo. 44, 39 S. W. 266.
McFadin v. *Catron*, 138 Mo. 197, 39 S. W. 771.
State v. *Haney*, 168 Mo. 167, 67 S. W. 620.
Scheufler v. *Manufacturers Lumbermen's Underwriters*, 163 S. W. (2d) 749.

This alone should be sufficient to destroy respondent's claim. However, a study of the constitutional provisions and the Missouri decisions clearly shows that petitioner had no right to apply to Division Two to make a transfer of the cause under the second clause of Section Four.

Respondent's sole claim is that the petitioner was entitled to apply to Division Two for a transfer to the court en banc under the *second clause* of Section Four of the 1890 amendments to Article VI of the Missouri Constitution. The case stands as though this were the only provision in the Missouri Constitution governing transfers. This clause provides:

> "When a division in which a cause is *pending* shall so order, the cause shall be transferred to the court *for its decision.*" (Italics ours).

The use of the word "pending" must be particularly noted.

The word "pend" is defined in Webster's New International Dictionary as:

> "To hang as if balanced; to be undecided, or in process of adjustment, as, 'The decision is still pending'."

The word "pend" is defined in Black's Law Dictionary, second edition, as follows:

> "Begun, but not yet completed; unsettled; undetermined; in the process of settlement or adjustment. Thus, an action or suit is said to be pending from its inception until the rendition of final judgment."

This clause authorizes a division, for reasons of its own, to order an undecided, or "pending" cause of action transferred to the court en banc for submission and "its decision." The language used is quite different from that contained in the first clause wihch specifically provides for transfer in three specific instances "on application of the losing party", not while the case is pending, but "after final disposition by the division." Rule 24 can only be construed as applying to the first clause of Section Four since it provides that motions to transfer "must be filed within ten days *after the final disposition* of the cause by the division." It could have no application to the second clause of Section Four since the second clause *says nothing about an application or motion and is only applicable to causes "pending in a division."*

The second clause of Section Four grants no authority for a transfer to the court en banc "for review" on the Court's own motion or on application where the division has already made a "final disposition" of the cause by determining it.

It was the evident intention of the framers of the constitutional amendment of 1890, as expressed in Sections One and Three that *all causes should be assigned to a division for hearing and decision,* except that a

division could, if it saw fit, order a cause "pending" before it assigned to the court en banc for hearing and decision under the provisions of the last clause of Section Four. This is the only provision by which a cause may get to the court en banc for original submission and decision. This clause was undoubtedly put in the amendment for the purpose of permitting seven judges instead of the judges composing a division to pass on matters which the division felt were of unusual significance.

It is also evident from Sections One and Three of the amendment *that the decision of a division is to be final and conclusive in all cases assigned to it* unless all the judges of the division do not concur, or unless the construction of the federal constitution is involved or the validity of a treaty, statute or authority exercised under the United States is drawn in question. In such cases the first clause of Section One provides that the losing party may have a rehearing before the Court en banc if he so desires.

Notwithstanding the clear purpose and intention of the amendment as expressed in Sections One, Three and Four, and the clear language of Rule 24, respondents claim that petitioner's rights herein should be denied because Division Two had the power under the second clause of Section Four to make a transfer of the cause on application after it had finally disposed of the case. This claim is rested exclusively on certain language used by the Missouri Supreme Court in an opinion handed down July 7th, 1942, after petitioner had filed his application for certiorari in this Court (June 11th, 1942). In *Scheufler* v. *Manufacturers Lumbermen's Underwriters, et al.,* 163 S. W. (2d) 749, the losing party in Division Two filed a motion with the court en banc, asking leave to file a motion to transfer from Division Two to the

court in banc under the provisions of the first clause of Section Four on the ground that a federal question was involved. He had filed a similar motion in Division Two where the cause had been finally determined adversely to him. The Court held that motions to transfer must be filed in the Division which had decided the case and that the court en banc could not compel a transfer of the cause; that the first clause of Section Four "has always been construed to mean that the application for the transfer must be made in the division from which the transfer is sought." The court en banc denied the application for leave to file a motion to transfer.

In passing thereon, the Court went into the field of dicta and made the following voluntary statement concerning the last clause of Section Four, although it was not involved: It is this voluntary statement of a matter not in issue upon which respondents rely:

> "Under the last clause of this section either division, on application or its own motion and for reasons deemed sufficient though not enumerated in the section, may order a cause transferred to the court en banc."

This is the only place in the Constitution, the laws, the court rules or the decisions of Missouri where any language is employed indicating that a division may act on an *application* under the last clause of Section Four. It does *not* hold that such application will lie "after a final disposition of a cause in a division." It gives no hint as to what the form of such application should be or what reasons would be "deemed sufficient" by the division as a basis for transfer. There is absolutely nothing in any provision of the Constitution, the code or in any rule or opinion of the Missouri Supreme Court to advise litigants as to what facts must be shown in an application to the Court on which to predicate an order

to transfer a cause to the court en banc under the second clause of Section Four.

If the language used in the Scheufler opinion can be construed to mean that the second clause of Section Four gives a litigant the right to apply to a division for leave to file an application to transfer after an adverse decision in that division, there is certainly an utter failure to give litigants or counsel any measuring stick by which such right may be exercised or to refer them to any rule, decision or constitutional provision that will enlighten them.

A comparison of Rule 21 governing motions for rehearing and Rule 24 clearly shows this insufficiency.

Rule 21 definitely prescribes the form and the contents of a motion for rehearing. Rule 24 merely refers to the constitutional provisions, which in turn, only provide for such motion or application in the class of cases mentioned in the first clause.

Boiled down, respondent's claim is that this Court should deny petitioner's application solely because he did not attempt by continuing to file motions and applications to excite or arouse some undefined discretion claimed to exist in Division Two after his petition for rehearing was overruled and the judgment became final; and that he was required to do so because of a statement made by the Court in the Scheufler case, *supra,* as to some mysterious and undefined discretion granted Division Two under the second clause of Section Four. Respondent could as well contend that a second or a third motion for rehearing should have been filed.

Under the Scheufler opinion, the division *is not required to entertain such an application,* but would first exercise its discretion as to whether the filing of such application would be permitted and if it sustained the

petition to entertain the application, it would then be at liberty to use its discretion as to whether or not it would grant it.

Since the Court has the power to set itself in motion, regardless of any application, petitioner could do nothing more than conjure up some reason that the Court would "deem sufficient" to justify it in setting itself in motion to set aside its opinion and grant a rehearing in the court en banc. The application could be nothing but a suggestion to the Court of some reason that the Court would deem sufficient for granting such transfer had it thought of the matter itself instead of having it called to its attention.

If litigants are not advised as to the basis upon which the Court will act to transfer a cause to the court en banc for grounds other than those mentioned in the first clause, they cannot be considered as having a clear, specific or fixed right to file any such application and their failure to do so should not result in their being penalized by this Court. Litigants cannot be bound by indefinite rights which are not reflected in the constitution, statutes, rules or published decisions. The provision in question has been in the Constitution of Missouri for fifty years and during that time neither the Legislature nor the Supreme Court have advised litigants or their counsel of the basis upon which a motion to transfer to the court en banc will lie, when not governed by the provisions of the first clause of Section Four.

Respondents in their brief set out two cases they have been able to discover in which a division entered an order transferring a cause to the court en banc after final disposition in the division where the grounds enumerated in the first clause of Section Four did not exist. It is obvious that the division in ordering the

transfer *did not do so under Section Four and Rule 24.* The division had made a "final disposition" of a cause not specified in the first clause of the section and the last clause only authorizes a division to make such transfer in "pending" causes.

Further, an examination of the opinion of the Missouri Supreme Court in the Klotsch case, 159 S. W. (2d) 589 (not yet officially reported) discloses that the Court entirely ignores the fact that the cause was transferred to the court en banc. Not a word in the opinion in any way indicates on what basis the division granted the Motion to Transfer. Nor does any other case which we have been able to find, *except those cases,* such as *Wilson and Company* v. *Hartford Fire Ins. Co.,* 254 S. W. 266; *Rowie* v. *Chicago, B. & Q. R. Co.,* 274 S. W. 1031 and others, *wherein the specific grounds contained in what we may term part one of the Section Four of the Amendment are considered.*

We therefore strongly urge upon this Court that in view of the Constitution, Statutes, rules and decisions of Missouri and the Missouri Courts, this Honorable Court cannot in the administration of justice require this applicant to pursue so nebulous a procedure as respondents would urge as a prerequisite to review by this Court. Litigants cannot lose their rights by failing to pursue remedies which are not only hidden from them but which even by the most diligent search and effort they cannot ascertain. The most fundamental rule of our jurisdiction is that the people are entitled to be fairly advised of laws and rules which are to bind them in the conduct of litigation. A decision of this Court denying the Writ would violate this most sacred principle.

Without in any way receding from the foregoing position, we would also point out that the filing of a motion to transfer to the court en banc should not be material in this case. This Court has never held that a litigant loses his rights by failing to do a frivolous thing. A useless, frivolous and meaningless procedure will never be required. We cannot know from any reported decision what grounds are recognized by the Supreme Court of Missouri as a basis for a transfer to the court en banc, but assuming that the Supreme Court did act in the two cases set out in their brief, because of conflict in the decisions of the two divisions, certainly no such ground existed in the present case.

These two cases were not transferred because of the constitutional provisions but because of the inherent discretionary power of a court to order a rehearing. Surely petitioner was not required to appeal to the inherent power of a court over its judgments as a prerequisite to review by this Court, which no rule of the Court either requires or permits.

Petitioner filed a comprehensive motion for rehearing in Division Two on December 26, 1941 (R. 516). In this motion and suggestions in support thereof he called the Court's attention to the reasons why the opinion was wrong and why a rehearing should be granted (R. 525-560). The original opinion was based on Division Two's construction of certain decisions of the Supreme Court of the United States and not on any prior decision of either division of the Supreme Court of Missouri. There were no decisions of Division One on the subject so that there could be no conflict between the opinions of the two divisions. The motion for rehearing was kept under advisement until March 13, 1942, a period of almost three months before being overruled. Division Two found

nothing which it "deemed sufficient" to arouse its discretionary power to transfer the cause to the court en banc. Petitioner could have set out no other or further reasons to justify a transfer to the court en banc in a motion for that specific purpose subsequently filed. The Court had inherent power to transfer the cause to the court en banc upon the motion filed by the petitioner but the Court decided the decision was sufficient and that no further hearing was required. In the light of the fact that petitioner has filed and had overruled by the Court his petition for rehearing and otherwise did everything required of him by the rules of the Court to protect his rights, can this Court refuse him the right to be heard because he failed to do something so frivolous and useless that the Supreme Court of Missouri does not even make provision for it in its rules? Surely substantial justice cannot be rendered on this basis.

(c) The court en banc is not a higher court than Division Two and a transfer to the court en banc does not constitute an appellate review but merely constitutes a rehearing.

Even if petitioner had a clear, fixed right to ask a transfer of the case, there can be no substance to respondents' contention unless the Court en Banc is the highest Missouri court and Division Two is an inferior court. Respondents cite only the case of *Gorman* v. *Washington University, supra,* in support of the proposition that the Court en Banc is the highest court in the state and Division Two is an inferior court. We have carefully examined the briefs in the Gorman case and find that the jurisdictional point was not raised or briefed by either petitioner or respondent but was raised by the Court on its own motion. We have likewise examined petitioner's motion for rehearing in that case and

find that this Court was not given the benefit of any authorities on that particular subject. Since this is a state procedural matter, the decisions of the Missouri court and not the decisions of this Court are controlling on this proposition.

Black's Law Dictionary, Second edition, thus defines "superior" and "inferior" courts:

> "The former being courts of general original jurisdiction in the first instance and which exercise a control or supervision over a system of lower courts, either by appeal, error or certiorari; the latter being courts of small or restricted jurisdiction, and subject to the review or correction of higher courts."

21 C. J. S., page 21, Section Seven, had this to say concerning superior and inferior courts:

> "A superior court is a court with controlling authority over some other court or courts, and with certain original jurisdiction of its own. Inferior courts are those which are subordinate to other courts, or which are of a very limited jurisdiction; those which are of very restricted jurisdiction and whose judgments and decrees can be reviewed by the higher tribunals. According to the technical meaning of the term, inferior courts are those the judgments of which, standing alone, are mere nullities, and whose proceedings, in order to give them validity, must show their jurisdiction."

When we apply the above definitions to the court en banc and the divisions thereof, it is readily apparent that the court en banc has none of the characteristics of a court superior to the divisions.

There is nothing in the amendment of 1890 to indicate that it intended to set up any intermediate or inferior appellate courts. It reads as follows:

> "All orders, judgments and decrees of either division as to causes and matters pending before it, shall have the force and effect of those of the court."

It was the clear purpose of the framers of the amendment to speed up the administration of justice in the Supreme Court of Missouri by increasing the number of judges and dividing them into two divisions and giving the divisions all of the powers and jurisdiction originally granted the Supreme Court to be concurrently exercised. It was clearly the purpose of the amendment to make judgments and orders of divisions the final judgments and orders of the Court. Sections One and Three provide for this. *Scheufler* v. *Manufacturing Lumbermen's Underwriters*, 163 S. W. (2d) 749, *supra.*

Section Four provides the only exceptions. The first clause does nothing more than permit a rehearing of certain cases by the full court and the second clause provides the only method by which the full court may originally hear and determine causes. The amendment merely divides up the work of the Court by providing in effect for three separate courts, Division One, Division Two, and the two divisions collectively. Each court is entirely independent of the others except that the divisions control the court en banc to the extent that they are the sole judges of the matters to be heard by it. The court en banc is given no original jurisdiction. It cannot review or set aside a divisional opinion. This is the clear meaning of the amendment and it has been so interpreted by the Missouri Supreme Court.

In *State* v. *Duestrow*, 137 Mo. 44, 39 S. W. 266, the Court held:

1. "The Supreme Court has no superintending control over a division;"

2. "Nor does an appeal or writ of error lie from it to the Court;"

3. "A division cannot be said to be inferior to the Court;"

4. "The judgment of a division has the same force and effect as a judgment of the Court;"

5. "Neither the subject matter, the amount in dispute, nor the question involved distinguishes the jurisdiction of the court from that of a division;"

6. "In each case, the judgment of a division is the judgment of a court of last resort, and ends the matter decided."

In *State* v. *Haney,* 168 Mo. 167, 67 S. W. 620, the Court held that the transfer of a cause to the court en banc *was not an appeal.*

In *Frohman* v. *Lowenstein,* 303 Mo. 339, 260 S. W. 460, the court en banc said:

"In a sense we have three separate courts for the hearing of cases. We have Division One, Two and the court en banc."

A transfer to the court en banc is not a review of a divisional opinion but a rehearing. The effect of granting a transfer is the same as granting a rehearing. The divisional opinion is set aside by the division itself so that the case may be submitted anew to the court en banc and the case stands as though it had never been submitted. New or amended abstracts of the record may be filed, new briefs submitted and new arguments made. The hearing en banc may extend to points not raised in or determined by the division. The opinion may be based on an entirely different matter than the opinion in Division.

In *Morris* v. *K. C. etc. Co.,* 303 Mo. 475, 258 S. W. 431, it is said:

"However, upon rehearing in a division, or after transfer to the court en banc, a case stands just as if it had not been previously heard and submitted."

To the same effect, see, also:

Frohman v. *Lowenstein,* 303 Mo. 339, 260 S. W. 460.

Sutton v. *Anderson,* 326 Mo. 304, 31 S. W. (2d) 1026, 1030.

Smith v. *K. C. Pub. Service Co.,* 328 Mo. 979, 43 S. W. (2d) 548, 555.

Fears v. *Newman Merc. Co.,* (Mo. en banc), 156 S. W. (2d) 909, 910.

Morgan v. *Kroger Gro. Co.,* (Mo. en banc), 154 S. W. (2d) 44, 46.

In the last cited case, the opinion of a division dismissed the appeal because of a defective brief and abstract. On a dissent of one of the judges, the case was transferred to the court en banc. The appellant filed a new abstract and brief. Since the point on which the division decided the cause, had been cured before submission to the court en banc, the court en banc considered the merits of the case where the divisional opinion passed only on the motion to dismiss.

We find, therefore, that this Court in the Gorman case did not have the benefit of the Missouri decisions when it held that a cause even under the first clause of Section Four "could, on petitioner's application, be transferred to the full court for *review* and the decision and judgment rendered by Division One *could be set aside by the Court sitting en banc.*"

Under the Missouri law, the decision of a division is not "reviewed" by the court en banc, neither can it be "set aside by the Court sitting en banc." The division of the Court sets the opinion aside when it grants the motion to transfer and leaves nothing for the court en banc to "review or set aside."

Where a court has the power of appellate review, its power is confined to passing on the correctness of the rulings of the court below and remanding it to that court for further proceedings. The court en banc, upon a

transfer from division, is not confined to a consideration of the points raised in division and does not review the divisional opinion but reviews the actions of the trial court as though the division had never passed upon the case. Authorities, *supra.*

Under the Missouri practice and procedure a motion to transfer after final decision is the same thing as an application to file a second petition for rehearing. For purposes of review in this Court, the filing, granting or refusal thereof has nothing to do with the statutory requirement that the decision be that of the highest court of the state, but only bears on the question of the time when the judgment to be reviewed became final. Although the Court may in its discretion entertain such motions, and having entertained them may, in its discretion, grant them for reasons of its own, this amounts to a rehearing rather than an appellate review. A petitioner is not required to conjure up a second application for rehearing as a prerequisite to review by this Court. However, had the Court permitted the filing of such a motion and had it been entertained the judgment would not have been final until it had been overruled. Had such a motion been filed, and had the Court refused to entertain it, the judgment would have been final as of the date the original motion for rehearing was overruled, and petitioner's time to apply for certiorari would have run from that time. Although a party is not required to file a motion for rehearing in order to have a final judgment, if he does file one and it is entertained, his time to apply for certiorari runs from the overruling thereof.

In *Gypsy Oil Company* v. *Escoe,* 275 U. S. 498, 48 S. Ct. 112, after an adverse decision in the state court, the losing party filed a timely petition for rehearing

therein, which was denied. An application for leave to file a second petition for rehearing was filed with the Court and thereafter leave to file it was denied. In discussing the time in which proceedings should be filed in the Supreme Court, this Court said:

> "But it begins to run from the date of denial of such petition and further suspension cannot be obtained by the mere presence of a motion for leave to file a second request for rehearing. If, however, a timely motion for leave to file the second petition is granted, and the petition is actually entertained by the court, then the time within which application may be made here for certiorari begins to run from the day when the court denies such second petition."

Since no motion for rehearing by the court en banc was filed, the judgment became final when Division Two overruled the motion for rehearing unless it should change its opinion and judgment of its own motion at the same term.

> *State ex rel. Berkshire* v. *Ellison*, 287 Mo. 654, 230 S. W. 970, 971.

(d) Finality of Opinion.

Although respondents do not claim that the judgment of Division Two was not final, they have cited the case of *Andrews* v. *Virginian Ry. Co.*, 248 U. S. 272, 39 S. Ct. 101. The case did not involve the proposition here urged concerning a judgment of the "highest court", but the holding therein was exclusively confined to a determination of when a judgment became final for purposes of review by this Court. The only direct holding made in that case was that a state court judgment for purposes of applying for a writ of error in the Supreme Court of the United States could not be final while an application for appeal to the highest state court was pending, under a clear, fixed right to make such applica-

tion, though its granting was "gracious or discretionary" and not "imperative or obligatory". This for the reason that otherwise "a judgment of a state court susceptible of being reviewed by this Court would, notwithstanding that duty, be open at the same time to the power of a state to review and reverse, thus, in substance, depriving each court of its power and begetting the possibility of conflict and confusion."

In the present case, there could be no question but that the judgment of the state court was final at the time the petition for certiorari was presented and that there could be no possibility of further review in the state court.

Petitioner had filed a motion for rehearing in Division Two under the provisions of Rule 21 of the Missouri Supreme Court. This was overruled on March 13th, 1942 (Rec. 556). At this time, Division Two had certainly made a final disposition of the cause within the meaning of Rule 24. If any right existed to file an application in Division Two for a transfer to the court en banc under the second clause of Section Four of the amendment, it had to be done (under rule 24) within ten days of the overruling of motion for rehearing under Rule 21 and, therefore, any power petitioner might have had to call into play the discretion of the Court for a further rehearing, expired on March 23rd, 1942, ten days after the motion for rehearing was denied. Thereafter, on the 25th day of March, 1942 a mandate was issued by the Supreme Court of Missouri, directed to the Circuit Court of Jackson County, Missouri, under the provisions of Section 1235, R. S. Mo. 1939.

This mandate was thereafter returned to the Supreme Court of Missouri, so that this petition could be filed in this Court. The withholding of the mandate on

such application to permit petitioner to apply to this Court for a writ of certiorari did not extend the jurisdiction of the Court to make a different determination of the case.

Aetna Ins. Co. v. *Hyde*, 327 Mo. 115, 34 S. W. (2d) 85.

The present case was determined at the September, 1941, term of said Court. Said term of court expired May 4th, 1942, at the beginning of the May, 1942, term of said Missouri Supreme Court.

Section 2047, R. S. Mo. 1939, provides:

"The regular terms of the Supreme Court shall hereafter commence on the first Tuesday of May, and the first Tuesday of September in each and every year."

Even had the last part of Section Four of the Amendment of 1890, given division two power on its own motion to transfer the cause to the court en banc after the expiration of the ten days mentioned in Rule 24, such power would have expired at the end of the term and no power to change the judgment in matters of substance would have remained.

Aetna Ins. Co. v. *Hyde*, 327 Mo. 115, 34 S. W. (2d) 85.

It is unquestioned, then, that at the time this writ was applied for on June 11th, 1942, the judgment of the Supreme Court of Missouri was final and no jurisdiction existed in any state court to change or alter it.

Conclusion.

It appears that under the decisions of this Court, and under the decisions of the Missouri Supreme Court to which we have drawn attention:

1. The court en banc is not a higher court than either division and has no supervisory power over a division and cannot review or set aside the judgment of the division.

2. That a party is not required to voluntarily attempt to arouse or excite some discretionary power of the division to transfer the cause to the court en banc.

However, the precise question involving the identical sections at issue here has never been raised in this Court in the exact manner now raised by respondents.

Under these circumstances, the entire matter should be determined by this Court so that the question may never again be raised and the entire matter will be settled for the future.

Petitioner has thoroughly analyzed and distinguished all of the cases cited by respondents on the merits of the present case in the original petition and will not prolong this reply brief by entering into any discussion thereon.

Respectfully submitted,

HARRY G. WALTNER, JR.,
Attorney for Petitioner.

RAYMOND E. MARTIN,
TRUSTY, PUGH, GREEN & TRUSTY,
Kansas City, Missouri,
Of Counsel.

10

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Supreme Court of the United States

OCTOBER TERM, 1942.

No. 140.

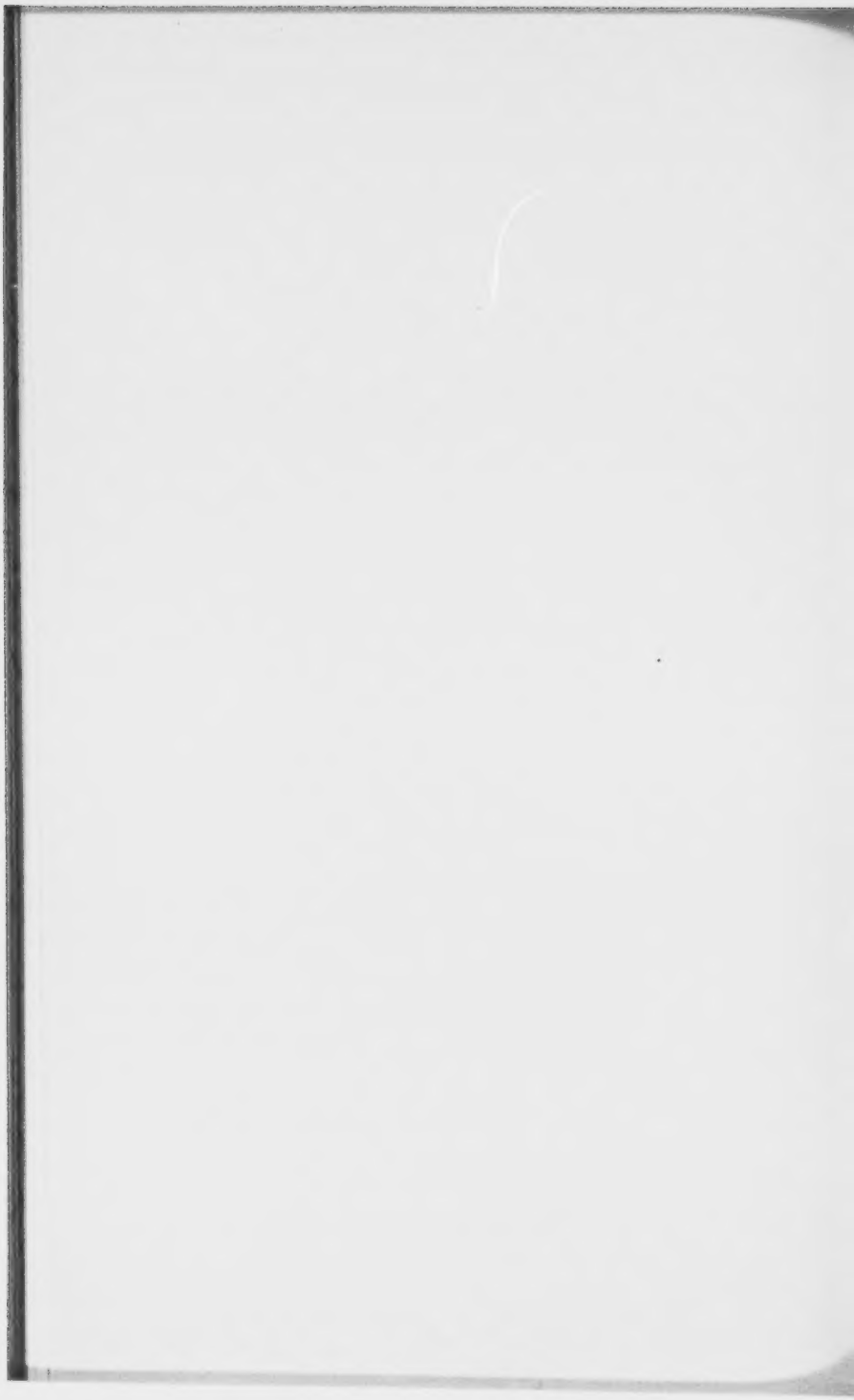
EUGENE W. OSMENT, PETITIONER,

VS.

NORMAN B. PITCAIRN AND FRANK C. NICODEMUS, JR., RECEIVERS OF THE WABASH RAILWAY COMPANY, A CORPORATION, RESPONDENTS.

RESPONDENTS' RESPONSE TO PETITIONER'S REPLY BRIEF.

EDGAR SHOOK,
N. S. BROWN,
J. H. MILLER,
SAM B. SEBREE,
JOHN S. MARLEY,
SEBREE, SHOOK & GISLER,
Kansas City, Missouri,
Attorneys for Respondents.



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RESPONDENTS' RESPONSE TO PETITIONER'S REPLY BRIEF.

This Court Does Not Have Jurisdiction.

Petitioner in his reply brief contends that Division Two of the Missouri Supreme Court is the highest Missouri court in which a decision could be had. Such contention is clearly unsound under the opinion of this court in the Gorman case and the opinion of the Missouri Supreme Court in the Scheufler case. In the Gorman case this court also declared

> "that no decision of a state court should be brought here for review * * * until the *possibilities* afforded by state procedure for its review by all state tribunals have been exhausted" (italics ours).

And in the opinion in the Scheufler case the Missouri Supreme Court declared that

> "under the last clause of this section, either division, *on application* or its own motion and for reasons deemed sufficient though not enumerated in the section, may order a cause transferred to the court *en banc*" (italics ours).

This *per curiam* declaration by the Missouri Supreme Court was made expressly in the light of the Gorman opinion. It is a plain pronouncement of the rights of a losing party in Division and of Missouri procedure for the guidance of bench and bar. It expressly approves the Missouri practice of the transfer by a Division of causes to the court *en banc* on application of the losing party for reasons deemed sufficient, even though not enumerated in Section 4. This practice is illustrated by the typical examples set out in Exhibits 2 and 3 in the Appendix to respondents' original brief.

Petitioner also contends that under the last clause of Section 4 a case is not *pending* in division after the motion for rehearing has been denied. This contention is unsound because, even though a division has denied the motion for rehearing, nevertheless the cause is still pending in such division until its mandate goes down or until it is transferred to the court *en banc* as contemplated by Section 4 and Rule 24. That this has been the construction of Section 4 and Rule 24 by the Missouri Supreme Court is illustrated by the action in the Klotsch case set out in Exhibit 3, page 23, of respondent's original brief and in Exhibit A attached to this brief. These exhibits show that after Division Two denied the motion for rehearing, motion to transfer was filed and granted under the last clause of Section 4. Said Exhibit A shows that the motion for rehearing was filed in Division Two on June 19, 1941, and was overruled on July 25, 1941. Said Exhibit 3 shows that the motion to transfer was filed in Division Two on the 4th day of August, 1941, within ten days after Division Two had finally disposed of the case as contemplated by Rule 24. The Klotsch case illustrates that the Missouri Supreme Court has construed Section 4 and Rule 24

to mean that a cause is *pending* for the purpose of transfer under the last clause of Section 4 after it has been finally disposed of in division by the denying of the motion for rehearing.

On page 4 of his reply brief, the petitioner discusses *Chesapeake & Ohio Ry. Co.* v. *Mihas*, 280 U. S. 102, 50 Sup. Ct. Rep. 42, 74 L. Ed. 207, *Minneapolis, etc., R. Co.* v. *Rock*, 279 U. S. 410, 49 Sup. Ct. Rep. 363, 73 L. Ed. 766, both of which cases came up to this Court from Illinois. In Illinois, judgments of appellate courts (intermediate) are reviewable by the Illinois Supreme Court where a majority of the judges of the appellate court make certificates of importance and grant appeals, or where such judgments are brought up by the certiorari issued by the Illinois Supreme Court. In the Rock and Mihas cases, applications for certiorari to the Illinois Supreme Court had been denied. No applications were made to the appellate courts for certificates of importance. This Court held that the denials of certiorari by the Illinois Supreme Court were decisions of the highest court of that state in which a decision could be had, because, under the Illinois law, the denial of certiorari by the Supreme Court of Illinois is an affirmance of the judgment of the appellate court, *i. e.*, a decision by the Illinois Supreme Court that the case was correctly decided.

The cases of *Betts* v. *Brady*, 86 L. Ed. 1116, and *Southern Railway Company* v. *Clift*, 260 U. S. 316, cited by petitioner, merely hold that after the highest court of a state has decided a case on the merits it is not necessary to request that court to again decide the case, as a prerequisite for this court's jurisdiction.

Petitioner then argues that a motion to transfer is in effect a motion for rehearing and that since Division Two of the Missouri Supreme Court had decided the case and denied rehearing that it was useless to apply to it for transfer. How does he know that? The issues on which a Division decides a case are not the same as those involved on motion to transfer. The Division judges

might be firmly of the opinion that they had decided a case correctly and yet conclude for reasons set forth by petitioner in an application that the case should be transferred to the full court for its decision, for example, because of conflict between decisions of divisions, or because a matter of importance is involved or for any other reason deemed sufficient though not enumerated in said Section 4. A losing party in Division who has not applied for transfer has not exhausted his possibilities for review by the Court *en banc.*

Petitioner in his reply brief contends that *he* had no *right* to a transfer to the court *en banc* and that he could not *compel* the transfer of the cause. The question is one of the *court's power* to transfer the case on motion by petitioner. Since it had that power and petitioner did not apply for its exercise, he has not exhausted his possibilities for review by the highest court of the state.

We respectfully submit that this Court does not have jurisdiction to review the decision and that the petition for certiorari should be denied.

EDGAR SHOOK,
N. S. BROWN,
J. H. MILLER,
SAM B. SEBREE,
JOHN S. MARLEY,
SEBREE, SHOOK & GISLER,
Attorneys for Respondents.

EXHIBIT "A."

No. 37124

IN THE SUPREME COURT OF MISSOURI
MAY TERM, 1941

EDWARD F. KLOTSCH, RESPONDENT,
VS.
P. F. COLLIER & SON, A CORPORATION, AND ELMER U. McATTEE, APPELLANTS

I, E. F. Elliott, Clerk of the Supreme Court of Missouri, hereby certify the motion for rehearing in the above entitled case was filed in this office on June 19, 1941, in Division Number 2 of this Court; also, the motion for rehearing as filed herein was denied by Division Number Two of this Court on July 25, 1941.

Given under my hand and seal of said Court, at the City of Jefferson City, this 22nd day of September 1942.

(Seal)

E. F. ELLIOTT,
Clerk.

.....
D. C.